92-1880

Supreme Court, U.S.
FILED
MAR 11 1993
OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1992 TERM

Mr. Patrick D. Kelly — Petitioner

vs.

Officer Arthur W. Ellis,
Officer Faye D. Mitchell — Respondents
City of Birmingham, Alabama,
Defendants to be Named

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF ALABAMA

Petitioner/Pro Se
Mr. Patrick D. Kelly
4841 Court S.
Birmingham, AL 35208
(205) 925-7804

QUESTIONS PRESENTED

FOR REVIEW

A. Should the 4th Amendment to the United States Constitution protect citizens from a policy or custom, done once or repeatedly, which would allow a police officer to allege a traffic violation in order to "account" for an "outstanding" (already containing dates, times, tag number, etc., of other peoples stops) traffic citation.

B. Would it be violative of a citizen substantive due process rights guaranteed under the U.S. Constitution, to allow the same police officer who would issue such a UTC to "amend" (take away) the UTC by issuing a second UTC alleging same charge, should citizen try to complain about it.

C. Would it be a violation of those

same substantive due process rights to allow such a broad, vague and open ended "Right to Amend", but deny the citizen the right to object to any Judge or magistrate and argue against its being taken away in order to not prejudice the citizens right to defend themselves in court of the charges.

D. Would supervision, in fact "instruction" by the same officers superiors in directing the officer in "amending" such a questionably constitutional traffic citation arrest subject those same superiors to liability for damages if it is ruled such actions violate the due process rights guaranteed citizens under the U.S. Constitution.

E. Since it would seem unlikely that a traffic citation that is wrong in date, time, tag numbers, dates of birth, having questionable intersections listed, and

even listing the wrong race (black instead of white) would have no standing in a court of law, would the action of "amending" (taking from possession of citizen) such a citation constitute the "moving force" behind a false arrest cognizable under 42 USC 1983 since it would seem the only reason such a questionably constitutional arrest could proceed to a guilty verdict.

F. Would the act of issuing and "amending" a citation such as that in the instant case, if later judged a violation of a citizens federally protected due process rights, would the issuing officer, supervising superiors, as well as the officials responsible to making or allowing such unconstitutional actions, be subject to damage claims, injunctive, declaratory relief, as well as punitive damage awards under 42 USC 1983.

G. Would the actions of such officers, public officers or municipal officers fulfill the "color of State law or authority" requirement of 42 USC 1983, since it violates substantive federal due process guarantees while in their official capacity as law officers or public officials.

H. Should those amendments of the United States guaranteeing citizens of certain unalienable rights, such as the right to be free of unreasonable search and seizure, the right of innocence unless proven guilty beyond a reasonable doubt, to compel witnesses and things necessary to a fair and impartial court and trial, apply towards all citizens, or should the citizens of Birmingham, Alabama who fall victim to Birmingham Municipal Code 8-4-8 be due lesser, or no protection of federally protected rights

of due process.

I. Since defendants have never overcome presumption of the charge against them, and were judged in default for willful refusal to comply with certain court orders, should the default judgment precluded court from any consideration of rulings or objections in their favor, in a trial in which the only and I repeat only issue was to allow me to prove damages to the jury.

J. Should Alabama Supreme Court ruling affirming Jury verdict, with support of state cases not heard by jury, not applicable since state law immunities do not apply in 42 USC 1983 Civil Rights Actions, and due to be overturned or reversed, since the record shows trial and verdict was on narrow issue of damages and verdict was already in favor of Plaintiff by default.

K. Should Alabama Supreme courts affirmation of directed verdict in favor of defaulting defendant be reversed, since verdict was already in favor of Plaintiff and release of City of Birmingham from Civil Rights liability, based on confusing and unsound ruling of "injunctive relief from failure to compel". would provide unsound basis for future Civil Rights review.

L. Should Alabama Supreme Courts affirmation of dismissal be overturned and reversed since City involvement was in controversy, Monell defense had been overruled and was moot by default, and affirmation using state and federal claims shows unclear adjudication of Federal Civil rights issued involved in case.

M. Since appeal to Supreme Court was for new trial should not affirmation of

release of City of Birmingham be reversed and new trial granted in light of Birmingham Municipal Code 8-4-8 which clearly involves a broad, vague and open ended "right to amend" closely paralleling the instant case and fulfilling the "official policy" requirement of Monell as the "moving force" behind Civil Rights violation.

N. Since all defendants were judged in default, should not rules require such parties seeking Directed Motion by written cases for trial court review, require defendants serve a copy of such on opposing counsel in order to facilitate making objections to such at trial and form proper appeals should they be needed.

O. In view of Default order for refusal to comply with orders to produce records, and fact that trial in favor of plaintiff

to prove damages only, yet found in favor of defaulting parties, should not court review entire record to ensure defendants haven't manipulated the court to gain a tactical advantage and preclude review of their actions and policies in regards to the instant case.

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Order of Motion to Reinstate Default Judgment April 17, 1991 Clerks record 300-302 A33-37

Motion to set court date to prove damages. Clerks record P. 303 & 335. $A37_b$

Motion for reconsideration of default order, overruled. Clerks record 305 & 335. $A33_c$

Trial date set. Clerks record 335. $A37_b$
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Motion for New trial by Plaintiff Clerks record P. 320, 329. A39-47

Overruled, Clerks record P. 336.

Appeal for new trial to Alabama Supreme Court filed may 14, 1992 * Constitutional issues and authorities only. A64

Seven day extension to file Brief, Due date May 14, 1992.

Appellant reply to Alabama S. Ct. Constitutional Authorities only. A36

Trial De Novo jury verdict. A6, A8

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Brown v. State of Alabama S. Ct No. 88-656 Appellant Brief Addendum, P. 21 Addendum P. 161

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City of Newport v. Facts Concerts 453 U.S. 247.

Cruz v. Cardwell (1973 CA 8 MO) 486 F 20 550, S. Ct. Brief, Ala. S. Ct. P. 30.

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Durisco v. K-Mart No. 4195, Div. of S.S. Kresge, Co. (1977 CA 5 TEX) 559 F 20 1274, C.R. 52.

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Herrara v. Valentine 653 F 20 1220, 1224 (8th Cir 1981) C.R.P. 52.

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Kaufman v. Moss (1970 CA 3 PA) 420 F 20 1270, AP Brief, AL, S.Ct. P.30.

Kentucky v. Graham (1985 U.S.) 87 LED 2 D 114, 105 S.CT. 13099 C.R.P. 52.

Kolander v. Lawson 461 U.S. 352.

Landrigan v. City of Warwick 628 F 20 736 (1980) AP Brief, Ala. S.Ct. P. 14 & 41.

Monell v. Department of Social Services 436 U.S. 658 (1978) C.R.P. 52.

Nesmith v. Alford 318 F 20 110 (5th Cir, 1963) App. Brief, Ala. S.Ct. P.32.

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Richardson v. Newark (1978 DC DEL) 449 F. SUPP 20 affirmed without op. (CA3 DEL) 620 F 20 289. Clerks record P.52.

Scheuer v. Rhodes (1974) 416 U.S. 232 Clerks Record P. 52.

Shapiro v. Thompson 394 U.S. 618, 629-30 App. Brief, Ala. S.Ct. P.10.

Shutlesworth v. Birmingham 394 U.S. 147.

Smith v. Wade 461 U.S. 30 App. Ala. S. Ct. Brief. P. 30.

Sykes v. California (1974 Ca9 CAL) 497 F20 197, Clerks Record P. 53.

Trotter v. Chicago (1983 ND ILL) 573 F. SUPP 1269 Clerks Record P. 53.

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1. City of Newport v. Facts Concerts 453 U.S. 247 Page R3

2. Greenwood v. Peacock 384 U.S. 808 Page R1

3. Kolender v. Lawson 461 U.S. 352 Page R2

4. Monell v. Department of Social Services 436 U.S. 658 Page R2

5. Shuttlesworth v. City of Birmingham 394 U.S. 147 Page R1&R5

6. Smith v. Wade 461 U.S. 30 Page R1&R5

7. 42 U.S.C. 1983 (1st, 4th, 5th, 6th, 8th, 14th Amendments) Page R1&R4 Appendix 5-8

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

MR. PATRICK D. KELLY
Petitioner

v.

Police Officer Arthur W. Ellis

Police Lt. Faye D. Mitchell

City of Birmingham, Def. et al

Respondents

Petition for Writ of Certiorari

From Supreme Court of Alabama

Petitioner, Mr. Patrick D. Kelly, respectfully requests and prays that a Writ of Certiorari be granted to review the judgment and opinion of the Supreme Court of Alabama opinion appearing in Appendix, p. A2-A5.

OPINIONS BELOW

Petitioner has no knowledge of whether or not ruling of Alabama Supreme Court is published. A copy of ruling is attached in Appendix A1,- A6

Petitioner also has no knowledge at this time whether or not ruling of Circuit Court of Jefferson County, Alabama, and jury verdict of trial for damages is published. A copy appears in Appendix A38 (E)(F)

JURISDICTION

Petitioner seeks Writ of Certiorari for review of Alabama Supreme Court decisions, a court of last resort, dated October 23, 1992 of which rehearing was denied December 11, 1992 (opinions appearing in Appendix, pgs. A1-A-6) of appeal from Circuit Court of Jefferson County, Alabama, of trial for damages

involving 42 USCS 1983-85 Civil Rights Action against City of Birmingham, Alabama, two named police officers, defendants et al January 18, 1992, Motion for new trial denied March 2, 1992.

Federal questions raised in lawsuit filed August 21, 1989, amended suit of October 10, 1989, and appeal to Alabama Supreme Court May 14, 1992, and appellant reply brief of June 24, 1992, appearing in Appendix, pgs A14-21, A22-26, A26-28

28 U.S. 1257, State Court, Certiorari (in part here and in Appendix pages ·). gives Supreme Court Right to review final judgments or decrees rendered by highest court of a State in which a decision could be had where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution.

42 USCS 1983, Civil Rights Action appearing in Appendix, pages A1(3), basis of suit filed August 21, 1989 and amended suit of October 10, 1989.

1st, 4th, 5th, 6th and 14th amendment Rights under U.S. Constitution, based in 42USC 1983-85 suit.

CONSTITUTIONAL PROVISIONS, treaties, statutes, ordinances and regulations involved.

42 USCS 1983 (appearing in appendix, pgs A11(6)).

Provides every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any person of the U.S. or its jurisdiction thereof, to deprivation of any rights, privilege or immunities secured by the Constitution and its laws,

shall be liable to the party injured in any action at law. The plain words of the statute impose liability for the conduct which subjects or causes to be subjected, the complainant to the deprivation of a right secured by the Constitution and its laws.

1st, 4th, 5th, 6th and 14th amendments to the U.S. Constitution of the United States. 4th amendment here, others listed in Appendix pgs. A8(a), A9-11(c)

4th amendment, U.S. Constitution. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issued, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to

be seized. This provision binds the states and its officers, including local police.

Constitutionality of "Policy or Custom", as yet unknown by law or statute, but based on actions of Officers Ellis and Lampkins, supported by Lampkin affidavit, of Birmingham Police Department which allows Police Officers to subject citizens to traffic stop, allege violation of traffic law, to "account" for outstanding UTCS, those already containing information from other places and persons stopped at earlier times.

Constitutionality, within 4th and 14th amendments to the U.S. Constitution and 42 USC 1983, of vague, broad and open ended "Right to Amend" such a citation by these same officers when legality

questioned, (take away and substitute another) all without giving citizen opportunity to object to such action before any Judge or Magistrate.

Although exact "Right to Amend Law" was not known at trial since City has never revealed the law it uses for such an obviously unconstitutional use, research during appeal recalled, and it was made part of motion for new trial to Supreme Court of Alabama Appellate Brief pgs. 76 and 77 Birmingham Municipal Code 8-4-8, which reads in part, (and if defendant has been arrested without warrant, the entry on the docket of the offense charged shall be treated as the statement) -- it shall be no objection to the proceedings that they are imperfect or inaccurate and all amendable errors shall be regarded as amended so as to

present only the substantial inquiry of the guilt or innocence of the defendant and the affidavit, warrant, or statement on the docket, one (1) or all, may be changed or amended to meet the state of facts shown in evidence.

Alabama Supreme Court ruling in favor of Directed Verdict of defaulting party, releasing City of Birmingham of liability from Federal Civil Rights Action under 42 USC section 1983-85, based on trial court ruling of "Injunctive relief from failure to compel."

Alabama Supreme Courts finding in favor of jury verdict for officers Ellis and Mitchell, using <u>state law</u> immunities for <u>Federal</u> violations, when jury finding was solely in favor of <u>no damages</u> only.

STATEMENT OF CASE

This case is a 42 USC 1983-85 Civil Rights action, centering on constitutionality of events surrounding, and constitutionality of prosecution flowing from a traffic stop "arrest" of Petitioner made by City of Birmingham Police Officer Arthur W. Ellis, on the night of March 12, 1986, done upon public roadway in Birmingham, and while in his duties as a Birmingham Police Officer.

On the night of March 12, 1986 I was stopped by Officer Ellis after approaching, stopping at and proceeding through a well known stop sign intersection in my neighborhood.

While I have always maintained my innocence of this charge (I was judged not guilty by jury in August 1988) there are numerous "unusual" circumstances

surrounding this case that caused me to endure an appeal spanning over two years, and explain why we are here 7 years later debating the Constitutionality of events surrounding this case.

Most unusual of all was the first citation issued to me the night of March 12, 1986, that being UTCE35672.

Inspecting the UTC at home after the stop, I noticed there were bits of information that clearly did not pertain to my being stopped. The "incorrect" information is as follows:

1. Although issued to me the night of March 12, 1986, date listed on UTC when issued clearly showed a date of March (0)6, 1986, a date off by six days.

2. Although stopped at approximately 11 p.m., time listed on UTC was 05:5(4) a.m., a time off by 17 hours.

3. Address was close, but incorrect by one number.

4. Tag number listed on UTC was 1G41455, not my tag number of 1H43216.

5. Date of birth listed was 03-06-60, not my birth of 11-16-52, which means it was off by 7 years.

6. Most incredible was the race listing me as black male when I am clearly a white male.

7. Although <u>not</u> noticed at the time, the intersection listed on the UTC did not correspond to the intersection of Avenue W. and Madison where I was accused of failing to stop for a stop sign. When issued to me, it had either the intersection of Avenue W and 47th Street, or Avenue V and 47th Street.

This information was important to my defense since if it were Avenue W and

47th Street there is no stop sign at that intersection.

If it was Avenue V and 47th Street there is a stop sign there, but it was almost a half mile away at an intersection I had yet to even come to!

Believing I was being made a scapegoat for someone elses ticket by Officer Ellis, I immediately went to the West Precinct of the Birmingham Police to file a complaint against Officer Ellis.

Upon meeting with Sgt. Lampkins (Now married and promoted, hereafter referred to as Lt. Mitchell) and explaining the reason for wanting to file a complaint, she called Officer Ellis to the station and instead of allowing my complaint or to even give me an explanation for Officer Ellis' actions, she instead instructed Office Ellis to take back and

write a new citation and refused to give me a copy of the first UTC.

Not wanting to sign another citation and wanting my first one back I was told I couldn't have it that it had to be turned in. Still wanting a copy, the officers refused.

I told Lt. Mitchell I needed the first UTC for my defense, and voiced my concern that the first UTC would disappear if given back with no surviving copy to show it ever existed, Lt. Mitchell told me it couldn't disappear, that a copy would appear in court along with the second UTC (E369601 also listing failure to stop as the charge).

Not believing her, but fearing for my safety in a police station with other officers present I asked to copy the "incorrect" information form the first

UTC in order to try and obtain a copy of it through the traffic citation department although I didn't tell Lt. Mitchell that.

She instructed Officer Ellis to give me back my first UTC to let me copy the information I needed, also noting their names and badge numbers, then I gave it back.

I then signed the appearance bond on the second UTC, making mental note that the time on the second UTC, 23:12 p.m. was the exact time we were in the station. Then I left.

Trying to file a complaint with Internal Affairs the next day, I was again refused, being told by 1 A. that it was a "simple mistake" not worth bothering with.

Attempting to get a copy from the

traffic citation bureau got no result, being told at first by a Ms. Ray who worked there that I could get a copy but being refused a copy by Mr. Bob Fields, head of the traffic citation bureau, when I arrived.

Mr. Field's reason for denying me a copy was "that charge isn't against you". Even after I said it most certainly was, he still refused.

Further complaints to Captain Sprayberry of the West Precinct got no immediate explanation, but did result in a phone call from Lt. Mitchell, trying to explain Officer Ellis reasons for having issued a UTC containing information from other stops and people on it.

She claimed to have talked to Officer Ellis and her investigation revealed Officer Ellis had started the

first UTC on someone else, but it turned into a DVI arrest and Officer Ellis ended up issuing the DVI stop three citations, somehow "forgetting" the one he'd supposedly "started" on.

Upon stopping me, he claims to have issued the first UTC to me "not knowing" it already contained times, dates, tag numbers, etc., of other people, since according to him, I'd made him stand in a pouring rain to write it by refusing to get in his patrol car.

Although it was raining at the time Officer Ellis wrote the UTC in his patrol car, being in the rain only to get my license and have me sign the UTC, at which time I too was in the rain, but had sat in my car while he wrote it.

Since it was obvious that further complaints to the Police were a waste of

time, I went to court on my assigned day only to be told by court clerk Mr. Bill Meeks that my records were not there, the officer was not there, and that if I wished to contest the ticket, I would have to travel 6.5 miles to Birmingham City Hall Traffic Citation Bureau and "ask" for a court date!

Appearing for my second court date, I was informed of the charge against me, asked how I plead and if I was going to represent myself and upon saying I was pleading not guilty, Judge Smitherman started to set a third date.

Upon telling her that was my second appearance and that the Officer should be there, she instructed the City Prosecutor to "get the officer out here" but when the prosecutor came back stating the officer could not be found, the Judge set

a third court date, at which time I asked about getting a coy of my first UTC.

I was told by the Judge to get a subpoena form, fill out what I needed to request and file it at the traffic citation department again 6.5 miles away.

Going to City Hall I talked to City Attorney Mr. Bentley, who tried to get me a copy, but finding none, told me how to fill it out, and to request some UTC's on either side of each UTC, which I did.

The City Clerks Office refused to comply with my request, giving no reason in support of their refusal.

Further refusals led to my requesting a postponement of my fourth court appearance and filing a written request in court May 18, 1986 requesting the original of UTC E357672, my reasons for needing this information, and

requesting a subpoena for Mr. Reginald Jones, the person the tag number listed on my first UTC belonged to.

Judge Smitherman granted my request, setting a court date of June 10, 1986.

Not being able to gain access to this needed information before Court, or even find out if the needed information would appear, I went to court June 10, 1986 unable to properly prepare my defense.

However, a copy did appear (of the first UTC) but it was a xerox copy which had the date, time and part of intersection altered from that which was on it when I was forced to give it up.

In a court hearing, a trial actually, in which I had to question and cross examine the officers just as an attorney would, I first learned that not

only was I charged with failure to stop, but accused of going through the stop sign at 40 mph!

Although Officer Ellis kept changing his story about why so much erroneous information was on first UTC, it was not until the City's own prosecutor came up with the ticket book which I'd been denied access to, that Officer Ellis admitted that he'd started the first one on Jones, but "could not" explain what happened that night that would cause the information to remain unchanged, except for his "standing in the rain" carbon error story.

Lt. Mitchell gave testimony that there was actually information about three people on that first UTC, but in the end, Judge Smitherman judged me guilty, stating the information was

"interesting" but offered no proof that I stopped. Testimony can be proven with court transcript, with exception of Judges judgment ruling, which was omitted. Judge Smitherman then fined me $50.00 (increased from $37.50) and assessed $21.50 court costs, instructed me to pay the clerk and informed me I had 14 days to appeal.

I paid the fine, hired an attorney, and appealed to Circuit Court for trial De Novo, one June 24, 1986.

Going through 3 different attorneys while enduring 22 months wait for trial since City refused to drop charges unless release signed, trial date of August 22, 1988 was set.

Appearing at trial, formerly arraigned and written charges filed against me, one day delay was granted to

request copies of UTC's, which city still refused to produce despite Freedom of Information request under State law, in addition to Motions for Production.

After one hour trial, limited only to stop issue, and allowing only discussion on xerox copy of first citation, but barred from showing other UTC's, jury took 10 minutes to decide I was not guilty and that included time took to pick foreman. Finding enclosed in Appendix p. . Arraignment and written charge appendix p. .

Attorney filed notice of suit within proper time, although I have no copy and former attorney will not supply me with one. Fired as my attorney in November 1988, I believe.

Alleged claim by attorney precluded other lawyers from taking case, forced to

file pro se 42 USC 1983-85 Civil Rights Action lawsuit on August 21, 1989 constitutional questions presented appearing in Appendix pp.A14-21.

Amendment to complaint filed October 10, 1989, constitutional issues raised appear in appendix pp A22-26

First request for Production of Documents filed November 21, 1989.

Letter to Judge of pre trial hearing, stating argument and again restating Constitutional issues, filed November 27, 1989, clerks record, pgs. 29-40.

December 1, 1989 Court orders Summary Judgements of City and Mitchell continued until discovery completed appearing in Appendix p.A28(a)

December 1, 1989 Motion to serve Ellis by publication granted. A28(c), A29

January 31, 1989 Affidavit of Publication completed. APPENDIX A29-31

March 28, 1990 Motion to Dismiss Ellis overruled. No affidavit ever filed by Ellis. Numerous motions and counter motions to compels, quash, sanctions, etc. until December 18, 1990 Plaintiff awarded judgment against all defendants as sanctions for willful refusal to abide by ARCP or order of this court. Plaintiff given leave to prove damages within 30 days. Judge Wynn appearing in clerks record p. 334 Appendix p. A33(A)

March 25, 1991 "The Judgment of 12/18/90 is set aside. The City of Birmingham is given 15 days to comply with all outstanding discovery.

If the City fails to comply with my discovery request, the court will enter a judgment for Plaintiff with leave to

prove damages. March 25, 1991, Judge Wayne Thorn.

Order on motion to reinstate default Judgment filed April 17, 1991/s/Wayne Thorn, Judge. Appearing in Appendix pA33-37

Motion to set court date to prove damages granted July 8, 1991.

Motion for reconsideration of default, overruled July 8, 1991 Judge Thorn.

Case set for trial January 13, 1992, came to trial January 15, 1992.

Courts instructions to jury according to Reporters transcript, page 5, lines 4-14. "This is somewhat of an unusual case in that the court has granted a default judgment against the defendants for failing to comply with the Judges orders, that was the reason for that default judgment. The only issue of

yours to consider is the amount of damages, if any, that you find that the Plaintiff has sustained in the particular case against the defendants.

Reporter page 24, lines 21-22, I ask, "Can I explain what happened the night of March 12, 1986?"

Reporter page 25, line 3-11, court in response to City's objection, states, okay, the only issue that the jury is to consider Mr. Kelly, is the amount of damages, if any, that you have sustained. I have granted a default in your behalf, so on the liability portion of it the only issue that the jury is to determine is how much damage, if any, you're entitled to.

Reporter page 27, lines 20-22, I ask, "Could I explain to the court what information was on that ticket when it

was given to me?"

Reporter page 27 line 23, Reporter page 28, line 1. City objects, improper form.

Reporter page 28, line 2-8 Court, "I will sustain to it not being relevant and material to the issues here."

You've already gotten over that face, Mr. Kelly. You've won that in argument, because I've ruled as a matter of law in your favor, okay?

Reporter page 33, line 12-13, Kelly state, "How much did I pay in fines? A $50.00 (fine) $21.50 court costs, which I paid.

Reporter page 33, lines 17-19, Kelly, "Well, I mean, I've paid a fine and I haven't gotten it back yet."

On Directed Verdict, RT 53 L 2-5 Court, "Okay. I'm going to overrule that

on the mental anguish portion of it submitted to the jury on the mental anguish."

RT 53, L 6-7, City Counsel, "As to all other counts, I --"

RT 53, L 8-12, Court, "Now, I think the City of Birmingham, from my reading of the 42 USC 1983, the City of Birmingham can only be subjected to injunctive relief for which --

RT 53, L 15-23, -- so I'm going to grant the Directed Verdict as to the City of Birmingham on that issue, on the issue of failure to compel. Under the Civil Rights Act, they're not entitled to it. I believe, though that the individual officers could be subjected to compensatory damages under this statute, so I'm going to submit it to the --

RT 54 L1 jury on that.

RT 67 L 19-23 Court, "Now is this case, Mr. Kelly has one type of damage, basically, that he's asking you to award him damages for and that's for his mental anguish as a result of the allegations he set.

RT 68 L 1, out in his complaint. So, after all that instruction that the jury in only to consider damages, damages, damages only, Judge Thorn then tells them --

-- If after full and fair consideration of all the evidence, you are not satisfied with the truthfulness of the material allegations in Mr. Kelly's complaint: RT 73 L 4-13, and RT 74 L 9-19 ---

Motion for new trial filed February 11, 1992, overruled Judge Thorn March 2, 1992, reasons appearing in appendix

Requested seven day extension for filing Appellant brief, setting filing date of May 14, 1992.

Appellant brief filed May 14, 1992 appearing in Appendix p A48.

Appellant reply brief filed June 24, 1992

Oral arguments denied, submitted on briefs July 7, 1992.

Alabama Supreme Court denied new trial, affirmed in favor of defendants, October 23, 1992. Appearing in Appendix

Application for Rehearing filed November 6, 1992.

Application for Rehearing denied.

December 11, 1992 Appearing in Appendix p. 1-3

Other parts of record to mention ---

Discovery requests interrogatories filed October 19, 1990 Birmingham Police

Captain Julius Walker, Birmingham Police Captain E. Mosby.

Discovery request interrogatories filed November 27, 1990 appearing in Appendix P.

REASON FOR GRANT

According to rule 10(B) of Supreme Court rules, a petition for Writ of Certiorari may be granted when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort, or of a United States Court of Appeals.

Alabama Supreme Court affirmed dismissal of City of Birmingham from Federal Civil Rights violations, affirming by its action confusing dismissal of trial court by "injunctive relief on failure to compel" under

authority of 42 USC 1983, citing numerous State and Federal cases even though State immunity does not apply in Federal Civil Rights cases.

City of Birmingham only Federal Authority cited in its defense was the Moot Respondent Superior theory of Monell v. Department of Social Services overrule by same trial court by default order of April 17, 1991, and specifically overruled in reconsideration ruled on July 8, 1991 by same trial court.

Although I can find no other case which supports dismissal from Federal Civil Rights violations based on injunctive relief on failure to compel, there are numerous cases cited during this case, of which Monell is one.

Other cases cited in original petition in support of violation of

Federal Rights through void for vagueness doctrine, since my suit centered on City's claimed "Rights to Amend" broadly, open ended and vaguely, a traffic citation issued containing dates, times, tag numbers, etc., of other people and stops before being stopped. Although could find no precedent to such actions, cited Shuttlesworth v. Birmingham, 394 U.S. 147, Kolender v. Lawson 461 U.S. 352, City of Newport vs. Facts Concerts as void for vagueness precedents, although were criminal, not civil in nature.

Also cited Monell and also Greenwood v. Peacock, 384 U.S. 808 and Smith v. Wade, 461 U.S. 30 on liability of officers for damage in regards to violation of Federal Rights under U.S. Constitution, along with Plain Error Rule

of Fed. R.C.P. Rule 51 28 U.S.C.A.

Numerous cases cited in support of 42 USC 1983 liability of defendants are scattered throughout the entire record, especially those cited in Pre Trial hearing December 1, 1989, which were (cites in 2nd Table of Authorities).

Richardson v. Neward, Turpin v. Marlet, Wellington v. Daniels, Bennet v. Sliddel, Hitt v. Cox, Zanghi v. Old Brookville, Himmelbland v. Harrison, Hill v. Morinelli, Trotter v. Chicago, Baker v. McCollan,

Kentucky v. Graham, Scheuer v. Rhodes, Monell v. Department of Social Services, Richardson v. Neward, Durisco v. K-Mart, Anela v. Wildwood, Sykes v. California, Herrara v. Valentine, Fiacco v. Rensaelaer (all in Clerks record, pages 52 and 53).

Scheuer v. Rhodes, 416 U.S. 232, 248, 94 s.ct. 1683, 1692, cited in Monell, 436 U.S. 659 at 202 .... Local governments sued under 1983 cannot be entitled to an absolute immunity lest today's decision (Monell, or Monroe v. Pap) be drained of meaning.

If Certiorari were granted in this case, and the record be reviewed as a whole, including evidence gathered during discovery that the defendants don't want the court to hear, the court will see that the City of Birmingham is being sued under far more than simple Respondeat theory, but is the moving force behind the violation and should not be removed from liability of Federal Civil Rights violations, especially under confusing "injunctive release or failure to compel."

Jury verdict was on narrow issue of damages only, and state law immunities supplied by cases listed for officers do not apply to Federal Civil Rights cases under 42 USC 1983.

CONCLUSION

No State or municipality should be allowed to structure its law enforcement and Judicial system in a manner that violates the Constitutional protections of due process, equal protection and other rights under the U.S. Constitution.

No court having ruled in favor of a Plaintiff in a 42 USC 1983 Civil Rights Action as a matter of law and by default should put concern for the rights of a defaulting party above the concerns and Due Process Rights of the prevailing party.

Due process was not met in this case, and before the U.S. Supreme allows the City of Birmingham to say that upon review of this case it can say it is operating its system of Justice with approval of the U.S. Supreme Court, Petitioner respectively requests and prays that Certiorari be granted in order to consider the grave injustice to be done society as a whole if these rulings should stand and that petitioner be allowed to present facts and evidence to the City of Birmingham seeks to block from court review by defaulting.

Petitioner believes that should Certiorari be granted in this case, and the entire case reviewed, the Court will see that justice demands that case be remanded for further proceedings to allow interested counsel to be hired to

properly present a case, amend pleadings to conform to evidence gathered during discovery, and a proper trial be held in order to protect the Federally protected Rights of citizens, through declaratory compensatory injunctive and punitive relief against defendants, especially Officers Ellis and Lt. Mitchell.

The Alabama Supreme Court rulings, in favor of trial courts ruling that the Civil Rights violation are not "relevant or material" to issue of damage telling jury to disregard information on UTC after already ruling in my favor as a matter of law and by default, release of City of Birmingham from Civil rights violations ruled in my favor as a matter of law, through vague "injunctive release from failure to compel" refusing to overturn Directed Verdict despite new

evidence of Birmingham Municipal code, and despite ruling already in my favor, and showing $71.50 fine taken in violation of Due Process has yet to be returned despite not guilty verdict by jury in 1988, and widely construing a jury verdict, based on very, very narrow issue of damages, in favor of defaulting parties, based on state immunities of Federally protected Constitutional Rights which were never considered by jury, clearly show a system of justice stacked against protecting the Federal Civil Rights of U.S. Citizens guaranteed them under the U.S. Constitution.

Therefore, Federal intervention is clearly warranted to not only ensure that birmingham Police officers are acting within the Constitution of the United States, but that the State of Alabama and

the City of Birmingham are operating there Judicial system in a just and unfair manner, and not for financial gain and to protect from civil or criminal liabilities resulting from their actions, or inactions.

Petitioner prays Certiorari be granted in order to review case as a whole, and overturn and remand in order to protect the Civil Rights of Society as a whole, not just to correct the great injustice done me in this case.

APPENDIX

APPENDIX

CIRCUIT COURT NO. 896670 SUPREME COURT NO. 1910921

APPEAL
TO
SUPREME COURT
OF ALABAMA
FROM
CIRCUIT COURT, CIVIL DIVISION
JEFFERSON COUNTY
BIRMINGHAM, ALABAMA
MR. PATRICK D. KELLY APPELLANT
vs.
OFFICER ARTHUR W. ELLIS, ET AL, APPELLEE

1910921

That portion of judgment in favor of the defendants Arthur W. Ellis and Faye Lampkin Mitchell, based on a jury verdict, as affirmed on the authority of Alpine Bay Resorts, Inc. v. Wyatt 539 50.20160(Ala 1988); G.M. Mosley Contractors, Inc. v. Phillips, 487 50 20.876(Ala. 1986); and White v. Fridge, 467 50.20 793(Ala. 1984). See also Campbell v. Burns, 512 50.20 1341 (Ala. 1987); Ashbee v. Brock, 510 50.20 214 (Ala. 1987); Jaward v. Granade, 497 50.20 471 (Ala 1986); Willingham v. State, 261 (Ala. 454 74 50. 20 241 (1954); Charles W. Gamble, McElroys Alabama Evidence 121.07(4th Ed. 1991); and rules 54(c) and 55; A.R. Civ.

Affirmed.

Maddox, Shores, Houston and Kennedy, concur. Ruled October 23, 1992.

Supreme Court of Alabama October term, 1992-93, 1910921, Patrick D. Kelly v. Arthur W. Ellis, et al, Appeal from Jefferson Circuit Court (CU-89-6670) Hornsby, Chief Justice.

That portion of the judgment in favor of the City of Birmingham, based on a directed verdict, is affirmed on the authority of 42 USC and 1983; City of St. Louis v. Praprotnils, 485 U.S. 112 (1988); Pembaur v. city of Cincinnati, 475 US 469 (1986); Monell v. Department of Social Services of the City of New York, 436 US 658 (1978); see Depew v. city of St. Mary's 787 F20 1496 (1986) Brooks v. City of Birmingham, 584

50.20.451 (Ala. 1991); Gore v. City of Hoover, 559 50.20 163 (Ala. 1990); Bahakel v. Tate, 503 50 20 61(Ala. 1983); Bahakel v. City of Birmingham, 427 50 20.143(Ala. 1983); and Neighbors v. City of Birmingham, 384 50 20 113(Ala. 1980)

Application for hearing overruled. The State of Alabama Judicial Department in the Supreme Court of Alabama December 11, 1992.

1910921 Patrick D. Kelly v. Officer Arthur W. Ellis, el al (Jefferson CU 89-6670)

NOTICE

The application for rehearing filed in this case is overruled. No opinion

written on rehearing. Hornsby, C.J. Maddox, Shores, Houston and Kennedy, J.J. concur.

I Robert Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instruments herewith set out as same appear(s) of record in said Court. Witness my hand this 11th day of December 1992. Robert G. Esdale, Clerk Supreme Court of Alabama.

Alabama Judicial Information System, case action summary case; CC 86002101.00. A. August 22, 1988. Defendant appeared in open Court for arraignment and entered a plea of not guilty to the charges in the complaint. Judge Mike McCormick,

cir. Judge.

B. August 23, 1988. Defendant heretofore having been arraigned upon a complaint on a charge of _____ and heretofore having plead not guilty thereto issue joined on said plea.

Thereupon comes a jury of good and lawful men to wit and eleven others, who being duly empaneled, sworn and charged by the Court according to law, before whom the trial of this cause was entered upon and continued from day to day and from time to time said defendant _____ _ being in open court at each and every stage of the proceedings in this cause, now on this the 23 day of August, 1988, said jurors A. upon their oaths do say; "We the jury, find the defendant not guilty of failing to stop for a stop sign as charged in the complaint foreperson

Bea J. Rumore.

In accordance with the jury verdict the defendant is adjudged not guilty. Judge Mike McCormick, circuit judge. Constitutional Provisions for 1983 actions.

B. First Amendment, U.S. Constitution. "Congress shall make no law respecting the establishment of Religion or prohibiting the free exercise thereof or abridging a freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances".

This provision in its entirety has been held to be applicable to the state and to state and local officials. If the police infringe first amendment rights, as either law enforcers or jailkeepers, they are subject to suit under 1983.

A. The Fourth Amendment U.S. Constitution, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by Oath of Affirmation, and particularly describing the place to be searched, and the person or things to be seized." This provision binds the state and its officers, including local police.

B. This Fifth Amendment [in part] "or shall any person be subject to the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without Due Process of law". Local and State officials, including the

Police are bound by these provisions.

A. The Sixth Amendment, U.S. Constitution. In all criminal proceedings the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for this defense.

B. Eighth Amendment U.S. Constitution. "Excessive bail shall not be required nor cruel and unusual punishment inflicted." This guarantee of rights applies against the states.

C. The Fourteenth Amendment [in part]. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without Due Process of Law; nor deny to any person within its jurisdiction of the equal protection of the laws." Unlike the first 10 amendments, the fourteenth amendment by its terms applies to the state.

B. 42 U.S.C. 1983 section provides "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected any person of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or

immunities secured by the Constitution and laws, shall be liable to the party injured or any action at law, suit in equity or other proper proceeding for redress". The plain words of the statute impose liability only for the conduct which "subjects, or causes to be subjected the complainant to the deprivation of a right secured by the Constitution and its laws.

B. Unknown Police "policy" regarding "accounting" for outstanding. Police Policy inferred from excerpts from Affidavit of Lt. Mitchell, filed September 28, 1989. Clerk record page 6, 7, 23, 24 quote "It is our departmental policy that all outstanding citations be accounted for per instructions for Magistrates office, the citation was turned into the Traffic Citation Bureau

with an explanation."

C. Municipal Policy regarding "Right to Amend" ticked issued containing information of other people and stops. Exact policy never given, "Policy" shown by actions of officer, and affidavit by Lt. Mitchell. Quote: "After looking over the citation, I did find approximately 3 - 4 errors. After contacting the magistrates office, I informed Officer Ellis to submit the first citation to the magistrate with an explanation of the errors."

B. Constitutional issues raised in original complaint of August 21, 1989, clerk's record Page 1-3 excerpts as follows:

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
ALABAMA

Patrick D. Kelly	)	
Plaintiff	)	Civil Action
vs.	)	CV-89-6670
Officer Anthony Ellis	)	
Officer Faye D. Lampkins	)	
City of Birmingham and	)	
Person or Persons, firms or corporations unknown at present.	)	

Complaint and request for
Production of Documents or
things to Plaintiff

1. I come before this court on this date, August 21, 1989 to seek the courts help under title 42 USC sec. 1983 and 1985, for redress of wrongs done against me.

2. I seek redress, compensation and punitive damages for the following wrongful acts.

3. On the night of March 12, 1986 at approximately 11:00 p.m., Birmingham police officer A. W. Ellis, Badge #289 E.D. #1869, while acting under color of state law did stop me without probable cause in bad faith and with malice, did issue UTC E357672.

4. I believe I can prove that said citation already contained dates, times, tag numbers, intersections, etc., of persons stopped six and five days prior merely needing a name, address and drivers license number to be issued, and that Officer Ellis falsely accused me of misdemeanor offense as an excuse to "account" for said citations.

5. Title 43USC 1983 N437 states, "Intentional traffic arrest made without

probable cause and without good faith is constitutional violation of sufficient magnitude so as to be cognizable under 42 USC 19832, and is not to be dismissed under De Minimus Doctrine." Richardson v. Newark (1978 DC DEL) 449F Supp 20 AFFO without opp. (CA3 DEL) 620 F20289.

6. I believe Officer Ellis' actions to be a clear abase of police power and a violation of my constitutional rights, especially those guaranteed under the Fourth Amendment.

7. Although I was convicted in Municipal Court on June 10, 1986 verdict was appealed and I was judged not guilty by jury on August 23, 1988.

8. Also on the night of March 12, 1986,

when confronted with his actions, Officer Ellis, again acting under color of State law (Right to amend) with the full knowledge and instructions of his superior did take away UTCE357672, and issue "amended" citation UTCE369301.

9. I firmly believe that allowing an officer this broad and unrestricted "right" to be unconstitutionally vague and restricts a citizens right to a fair and impartial trial by allowing evidence of a clearly unconstitutional arrest to be "colored" under State law to appear constitutional and correct.

11. While a citation is merely a written record, it stands as a witness to the facts surrounding the arrest. It not only stands as a witness as to who was

arrested and why but also serves as a witness to the officers grasp of the facts as they happened.

12. I believe that once issued, a citation should be protected by the courts from alteration or destruction because to do otherwise violates a citizens right of due process.

14. Also on the night of March 12, 1986, in instructing and allowing Officer Ellis to take away a citation that was the basis of a citizens complaint of wrong doing, I suspect Sergeant Faye D. Lampkins (amended Mitchell) while acting under color of State law did enter into a conspiracy to violate a citizens Constitutional rights.

15. Allowing evidence of a false arrest to be "colored" to appear proper is a violation of due process rights and denies equal protection to citizens.

16. If said police officer, or any police officers are allowed to violate one's constitutional rights while acting under State law or police policy, then I hold that the Birmingham Police Department and/or the City of Birmingham are liable for their actions.

17. Plaintiff was denied due process by City's Municipal Court. Courts policy of forcing citizens to make numerous court appearances merely because the accusing officer failed to appear in previous court appearances denies citizens due process and subjects innocent citizens to

penalties of time and money equal to or in excess of any fine to be imposed.

18. Further, to judge any citizen guilty because they fail to prove their innocence of the charge against them is the greatest constitutional violation of them all.

19. Despite perjured testimony so as that even the prosecuting attorney questioned the officers testimony and integrity, and despite questions of altered evidence, Judge Smitherman, in her ruling, stated that "--- while interesting, those facts offer no proof that you stopped." Such a verdict, whether isolated to my case or a matter of court policy clearly violates a citizens right of innocence unless guilt

is proven.

20. I hold the City of Birmingham responsible for the unconstitutional actions of its Judicial Officers.

21. I allege from the beginning the City of Birmingham, its officers and courts have engaged in malicious prosecution designed not for the purpose of bringing someone to justice but rather to harass, intimidate and cause great financial strain on a citizen in order to force him to give up his right of redress for grievances done against him in exchange for dropping of charges.

22. I believe the City's malicious prosecution, failure to protect records, and denial of access to records clearly

violates rights due me under the Constitution and gives me cause for action under Title 42USC 1983 and 1983. I ask for compensatory damages in the amount of Three Thousand Seventy One Dollars and Fifty Cents ($3,071.50) and punitive damages of One Million Dollars ($1,000,000.00) for violation of Civil Rights, loss of income, mental anguish, stress causing loss of sleep, adding to loss of employment and stress related illnesses.

I demand trial before struck jury.

Patrick D. Kelly

B. Amendment to complaint clarifications, filed october 10, 1989, Clerks record pg. 12-15 excerpts as follows:

6. I accuse Birmingham Police Sergeant Faye D. Lampkins of conspiracy to violate my civil rights and seek redress and compensation for the following wrongful acts.

6(a). On the night of March 12, 1986, while investigating my false arrest complaint against Officer Ellis, Sergeant Lampkins, while acting under color of State Law (Right to Amend) did instruct and allow Officer Ellis to take away evidence that was to be the basis of my complaint and defense against his charge thereby entering into conspiracy to violate my Constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendment of the U.S. Constitution, thereby giving me cause of action under 42USC 1983 and 1985.

7. I hold the City of Birmingham responsible for the actions of Officers Ellis and Lampkins and accuse the City of Birmingham of violating my rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution and conspiracy to violate my rights by the actions and inactions of its officers, municipal officers and employee, giving me cause of action under 42 USC sec. 1983 and 1985 for the following acts;

7(a) Right to amend law is too open ended and vague and violates my due process rights by subjecting evidence to alteration and subjecting me to malicious prosecution using altered evidence and false testimony denying me a fair and impartial trial.

7(b) City's policy requiring me or anyone to a minimum of two, sometimes more, court appearances violates due process rights by denying me opportunity to confront the witnesses, to be informed of the nature and cause of the accusation against me so that I can prepare a proper defense.

7(c) Failure and refusal of City's Traffic Citation Department, Municipal Court and Police Department to allow access to and copies of Public Records to me and my attorneys denies me due Process under the First, Sixth and Fourteenth Amendment of the U.S. Constitution.

7(f) By violating that constitutional right (innocence until proven guilty) and judging me guilty, rising altered

evidence and testimony so false even the prosecuting attorney questioned its validity, I hereby accuse the City of Birmingham and its courts of engaging in Malicious Prosecution designed to protect itself from false arrest liability, to intimidate me to drop my appeal and force me to give up my constitutional right to seek redress for grievances done against me, in exchange for dropping charge.

Pretrial Issues

Discuss issues of suit, list authorities under 42 USC 1983-1985 believed had bearing in my case.

Authorities listed were Richardson V. Newark (1978 DC DEL) 449 F Supp 20 AFFD without OP (CA3 DEL) 620F20289/ Turpin V. Mailet (1980 CA2 CONN)

619F20196/ Wellington v. Daniels (1983 CAY VA) 717F20932/ Bennet v. Sliddel (1984 CA5 LA) 735F20861/ Hitt v. Cox (1984 CAY VA) 737F20421/ Zangi v. Old Brookville (1985 CA2 NY) 752F204/ Himmelbrand v. Harrison (1980 WOVA) 484F SUPP 803/ Hill v. Marinelli (1982 NO ILL) 555 SUPP 413/ Trotter v. Chicago (1983 ND ILL) 573 F. SUPP. 1269/ Baker v. McCollon (1979) 443 U.S. 137/ Kentucky v. Graham (1985, US) 8772ED 2nd 114, 105 S.C.T. 13099, Scheuer v. Rhodes (1974) 416 U.S. 232.

Arguments against Respondent Superior theory in Pre trial issues, Authorities as follows:

Monell v. Department of Social Services 436 U.S. 658 (1978)

Richardson v. Newark (SUPP)

Duriaco v. KMart NO4195,m Div. of S.S. Kresge Co. (1977 CA - TEX) 559 F2D 1274 44 ALR FED 219/ Anela v. Wildwood (1984 DC NJ) 595 F. SUPP 511/ Sykes v. California (1974 CA, CAL) 497 F20 197/ Herrera v. Valentine, 653 F20 1220, 1224 (8th CIR, 1981)/ Fiacco v. City of Rensselaer, N.Y. 783 F20 319 (2nd CIR. 1986)

4. Continuance of Defendants motions for Summary Judgment. Judges order, December 1, 1989, Clerks record P. 331, as follows:

Defendants, City of Birmingham, and Faye D. Lampkins, Motion for Summary judgement are continued generally until discovery is completed. Wayne Thorn, Judge.

B. The Court having considered the

Plaintiffs Motion to serve Officer Ellis by Publication grants said motion. Wayne Thorn, Judge December 1, 1989, Clerk's rec. 331.

Order of Publication

Civil Action CU 89-6670, Circuit Court Tenth Judicial Circuit of Alabama (Civil Division) Patrick D. Kelly, Plaintiff vs. Officer Arthur W. Ellis, et al, defendant. Officer Arthur W. Ellis, et al, defendant, whose whereabouts is unknown, must answer Patrick D. Kelly, Plaintiff complaint for compensatory and punitive damages as result of defendants willful violation of Plaintiffs Civil Rights in violation of 42 USC section 1983 and 1985 by February 27, 1990, or thereafter a judgment by default may be rendered against said defendant in the above styled case.

Done this 21st day of December, 1989 Polly Conradi, Clerk of the Circuit Court, Jefferson County. Patrick D. Kelly, 4841 Court S., Birmingham, Alabama 35208, Attorney (Pro Se) for Plaintiff, Ala. Ms. December 30, 1989, 16, 13, 20, 80 State of Alabama, Jefferson County. Before me, the undersigned authority in and of said County in said State, appeared Eleanor Abercrombie Foster who, by me duly sworn, deposes and says that she is the Publisher of Alabama Messenger, a weekly newspaper of general circulation, published and printed in Jefferson county, Alabama, and which has been in continuous publication since 1918 and there was published in said newspaper in the issues of December 30, 1989, January 6, 13, 20, 1990 a legal notice, a copy of which is hereto attached.

Eleanor Abercrombie Foster
Publisher
sworn and subscribed to
on this the 22nd day of January
1990, amount $50.00 (clerks
record pg. 73.)

B. Interrogatories Discovery Request, Part C, filed November 27, 1990, Clerks record P. 191, requesting interrogatories for Department Chief Charles Newfield, Birmingham Police Department, Mr. James Baker, City Attorney, Mayor Richard Arrington, City Council Members William Bell, Bill Myers, Roosevelt Bell, David Herring, Linda Coleman, Eddie Blankenship.

A. Deposition Notice CV.89-6670 filed November 27, 1990, Clerks record p. 195. Please take notice that at 9:00 a.m. on the 21st day of December, 1990, I will take the depositions of defendants Officer Arthur W. Ellis, and Sgt. (Lt.) Faye D. Lampkins, both of the Birmingham

Police Department, upon oral examination before Hope O. Winters and associates, court reporters, whose address is 2015 2nd Avenue North, Mezzanine Level Berry Building, Birmingham, Alabama 35203.

Letter requesting review of Ellis personnel file filed November 28, 1990, Clerks record, 197, to Judge Wayne Thorn.

Your Honor, I have scheduled depositions for Officers Ellis and Lampkins for December 21, 1990. At this time I would like to again ask if you've been able to review Officer Ellis' personnel file.

You have had over 4 months to review this information and while I know you're busy, I need to review this file before Officer Ellis' deposition.

This is my third request since August for this information and I would

appreciate your granting my request to review this information.

Patrick D. Kelly

B. December 6, 1990, the Court having considered the personnel files for Officers Elllis and Lampkins in camera orders the defendant, City of Birmingham to produce the file to Patrick D. Kelly on or before December 20, 1990 at 5:00 p.m. Done this 6th day of December, Judge Wayne Thorn. Clerks record p. 334.

A. December 18, 1990 Plaintiff is awarded judgement against all defendants as sanctions for willful refusal to abide by ARCP or order of this court. Plaintiff given leave to prove damages within 30 days. Judge Wynn. Clerks record 334.

B. Order on Motion to Reinstate Default

Judgment filed April 17, 1991. CV-89-6670. Clerks record 301-302.

On May 4, 1990 the Plaintiff filed Motion for discovery production of documents necessary to the Plaintiff. Judge William Fackson ordered defendants to answer and/or respond within 60 days on May 29, 1990.

The defendant, the City of Birmingham as failed to respond as ordered specifically to items 2, 3, 6 and 7 of said motion.

May 18, 1990 the Plaintiff filed Motion for Discovery, Production of Documents necessary to the Plaintiff. Judge Jackson on May 29, 1990, ordered the Defendants to answer and/or respond within 60 days.

On March 25, 1991, the undersigned also directed the Defendant, City of

Birmingham, to comply with the request in 15 days. The City of Birmingham still has not complied with the order specifically to item 3.

This court further considered the plaintiffs Motion for order compelling discovery filed may 4, 1990. Judge Jackson on May 29, 1990 ordered the City of Birmingham to answer and/or respond within 60 days. On March 25, 1991, the undersigned also directed the Defendant to comply with this request within 15 days, and the Defendant has failed to comply for the second time.

On December 18, 1990, Judge William Wynn awarded the Plaintiff a judgment against the Defendants as sanctions for willful refusal to abide by ARCP or order of this court.

On March 25, 1991, the undersigned

set the judgment aside. The City of Birmingham was given 15 days to comply with all outstanding discovery. My order further stated that on failure of the City of Birmingham to comply, a judgment would be entered against said defendant.

Still the Defendant, the City of Birmingham, failed to comply with the courts orders. On April 17, 1991, the Plaintiff filed a Motion to reinstate Default Judgement. This motion was heard on May 13, 1991.

The court is perplexed by the obvious willful and deliberate failure of the Defendant, the City of Birmingham, to obey and comply with the numerous orders of this court. The court has attempted to work with said Defendant to no avail. At the hearing the court said it was going to issue sanction of $100.00 per

violation of its prior order. However, after reconsidering, the court finds there is a blatant violation of its orders of several Judges and the only possible sanction is to reinstate Judge William Wynn's order of Judgment of March 25, 1991 (error, actually December 18, 1990).

Therefore, it is ordered judgment is entered against the defendant, the City of Birmingham, and for the Plaintiff with leave to prove damages.

A. Done, this the 24th day of May, 1991. Wayne Thorn, Judge.

B. Motion to set Court date to prove damages, granted July 8, 1991, Clerk rec. 335.

C. Motion for reconsideration to overturn default, overruled July 3, 1991, Clerks record 335 and 305.

D. Trial set for January 13, 1991, came to trial January 15, 1992.

(Condensed Jury Finding)

E. We the jury, find in favor of defendant(s) Faye O. Mitchell/Officer Ellis.

F. Pursuant to verdicts, the court enters a judgment for the defendants and against the Plaintiff. Cost of court are taxed to the Plaintiff. Done this the 15th day of January 1992.

Wayne Thorn, Circuit Judge

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

Patrick D. Kelly	)	CV 896670
v.	)	Filed in office
Officer Arthur Ellis	)	Feb. 11, 1992
Lt. Faye D. Mitchell	)	
City of Birmingham	)	

Motion for New Trial

I, Patrick D. Kelly, Plaintiff above styled action, do come before this honorable court seeking to move it to grant me a new trial concerning the above action, for the following reasons...

1. Defendants being judged in default, and plaintiff having won the right to prove damages before a jury by explaining all facts and evidence, I believe the court erred in allowing defendants right to object to any testimony or evidence. I believe defendants sacrificed right by default.

2. Defendants being in default, I believe court erred in putting their

right to object above the right of prevailing party to testify as to facts causing violation of rights.

3. Sustaining defaulting parties objection to testimony explaining being stopped and issued citation already containing information from 2 (two) other people, severely prejudiced prevailing plaintiffs right to present all facts and evidence surrounding arrest, which is heart of my cause of action. If officer did no wrong, and city's policy allows such arrest, defendants should have no objection to testimony which should support their case. Plaintiff is the one taking risk of putting doubt in juries mind by talking of alleged violation which he'd been judged not guilty of. Jury cannot determine damage regarding false arrest if they cannot determine why

said arrest was false and violated plaintiffs 4th amendment rights.

4. Sustaining defaulting parties objections to testimony of arrest and issue of fraudulent citation, court erred in barring testimony by logical progression of why due process rights of plaintiff were violated when said citation was taken away by instructions of superior officer and not a Judge. This also barred entry of evidence (citations) which are the heart of the constitutional questions raised by the actions of these officers, following official police procedures established by the City of Birmingham.

5. While this Plaintiff respects the right of court to allow, or disallow, narrative testimony, the courts requiring

plaintiff to ask himself questions framed in proper legal predicate, put me under severe stress, aggravating an anxiety disorder I suffer, and made it impossible to present my case properly to the jury ... Having won right by default and if court is really interested in truth and protecting the constitutional rights of citizens, as Pro Se Plaintiff I believe I should have been allowed to present the facts in the best way to arrive at the truth, which hasn't been heard in any court hearing my case, in regards to the defendants testimony.

6. Being judged in default, liability of defendants was established. I know of no proper motion filed by the city, no copy was served on me, to dismiss them from liability. Courts dismissal of City as defendants was not

only improper but fails to hold them accountable for their established policy which violates citizens rights. (Issuance, taking away without review by Judge or magistrate, argue against "amendment" or retain copy for defense). Not allowing citizens to retain evidence of a false arrest (citation) issued to them, or at least have a chance to argue against the citation being taken away goes to the very heart of the due process violations raised by this arrest and prosecution. This matter was for jury to decide, not Judge and court erred not only by barring testimony of the citation being taken away but also in dismissing City as defendant before it went to jury.

7. Dismissing City as defendant also barred me from recovery of $71.50 in fines and court costs the City still has

not returned 3 $^{1}/_{2}$ years after I was judged innocent by jury in August of 1988. City's refusal to return it, making my money subject to a claim to be approved or disapproved by their attorneys is another liability established by their default, and subject to a juries decision, not the Judge's.

8. Other damages barred from collection by the prevailing party because of sustained objection of a defaulting party, are those of lost wages due to corrupt actions of the City and Officers. If deliberate violations of citizens constitutional rights occur due to corrupt acts, and citizen prevails in court action, then I believe citizen has right to be reimbursed for time lost in fighting corrupt, illegal prosecution. City's liability is established by

denying me access to original of first citation and taking said original to attorneys office from which they disappeared, either through indifference or deliberate destruction.

9. Courts decision to place no restrictions on a defaulting party sets a dangerous precedent of rewarding contempt and condoning violations of citizens constitutional rights. Defendants were judged in default for willfully refusing to produce records to me, records that record the actions of the officers and help reveal the truth. By allowing defaulting defendants to object to any and all testimony or evidence is rewarding contempt by allowing defaulting defendants full rights in an open trial. I must ask what is the purpose of default judgment then?

10. The courts dismissal of City as a defendant, already liable by default, and allowing a defaulting party to block testimony regarding their illegal acts, (which they say are not wrong) in effect wastes the almost six years and thousands of dollars I've spent trying to stand up and protect my constitutional rights by bringing them for review before a court of law that is supposed to be interested in the truth, no matter who it hurts.

11. Defendants being judged in default, the court erred in instructing the jury to find either for the plaintiff or the defendants. Since the plaintiff was prevailing party, and defendants liability was established by default, proper instruction would have been for the jury to find either nominal, or substantial damages for the plaintiff.

This courts actions, and the resulting verdict leave me not only confused but the court itself because although I won by default, I am being taxed for costs.

It is for these reasons and the resulting confusion it creates about the constitutional issues involved that I hope the court approves my request for a new trial by jury. The truth concerning the officers actions and the City's policies regarding them must be told for a jury to decide if the constitution is worth having.

Patrick D. Kelly

Circuit Court No. 89-6670
Supreme Court No. 191092

Appeal
To Supreme Court of Alabama
From
Circuit Court, Civil Division
Jefferson County
Birmingham, Alabama
Oral Arguments Requested
Mr. Patrick D. Kelly Appellant
vs.
Officer Arthur W. Ellis, et al. Appellee

Appellant Brief of
Patrick D. Kelly
Pro Se

* Constitutional issues only - authorities

Issue No. 7

Can issuance of traffic citation rise to sufficient magnitude to be able to state a claim under the Civil Rights Act, providing for a civil action for deprivation of a motorists Civil Rights.

Answer: yes

Richardson v. City of Newark 449 F. SUPP. 20(1978) reached conclusion; intentional traffic arrest made without probable cause and without good faith is a violation of motorists constitutional rights of sufficient magnitude to state a claim under section of Civil Rights act providing for a civil action for deprivation of rights 42 USCA 1983.

Delaware v. Prouse 440 U.S. 648 at 653 (1979) concluded that the general rule is a seizure occurs everytime a motor vehicle is stopped, the provisions

of the Fourth Amendment against unreasonable searches and seizures apply. Court said "the fourth and fourteenth amendments are implicated in (this) case stopping and detaining its occupants constitutes a "seizure" within the meaning of those amendments, even though the purpose of the stop is limited and the resulting detention quite brief."

Shapiro v. Thompson 394 U.S. 618, 619-30, 89 SCT 1322, decided: The freedom to go about ones business peaceably is a cherished liberty interest in our county protected by the constitution.

Issue No. 2

Was the trial courts granting a defaulting parties request that the prevailing Pro Se Plaintiff ask himself questions in "proper legal predicate",

prejudicial to Pro Se Plaintiffs right to present his case to jury so that they could arrive at a just verdict.

Answer: I believe yes.

McElroy Alabama Evidence cites Willingham v. State, 261 Ala. 454, 74 SO 20 241 (1954) Mobile J.K.C. R.R. v. Hawkins, 153 Ala. 565, 51 So 37 (1909) Fed. rule 611(a).

It is written the discretion of the trial Judge to permit the witness to narrate the matters and things observed by him without his being asked specific questions.

If the witness engaging in the narrative type of testimony relates inadmissible matter then, of course, the other party may object and enter a motion that such matter be stricken.

Regarding Pro Se litigants in 42 USC

1983 actions:

Cruz v. Cardwell (1973 CA MO) 486 F20 550.

Pro Se complaints under 42 USC 1983 are held to less stringent standards than pleadings drafted by lawyers.

martin v. Wainwright (1976 CA FLA) 526 F 20 938.

District Court must be sensitive to problems of Pro Se Plaintiff in Civil Rights Action and not be too quick to dismiss complaint for failure to state technical cause of action.

Kaufman v. Moss (1970 CA 3 PA) 420 F20 1270 Cert. denied 400 U.S. 846.

Complaint alleging violations of 42 USCS 1983 and 85 must be specifically pleaded in order to avoid motion to dismiss; however, this rule is not intended to be applied so as to subvert

liberal policy favoring amendment of complaints expressed in F.R.C.P. Rule 15(a) and considerations underlying requirement of specificity must be balanced against equally important policies that Pro Se litigants not be denied opportunity to state civil rights claim because of technicalities, and that litigation, where possible, should be decided on merits.

Issue No. 3

Was trial courts ruling against telling circumstances surrounding first unlawful arrest, and subsequently the second unlawful "arrest" and unlawful prosecution by logical progression, prejudicial and fatal to prevailing parties (Kelly's) right to present facts to jury in order that they arrive at just decision in regards to damages and

punitive damages.

Answer: Yes.

Borunda v. Richmond 860 F20 937 decided: whether officers acted without probable cause when making arrest, for purposes of damages claim under 42 USC 1983 was a question for jury, where facts and circumstances surrounding arrest were disputed.

Smith v. Wade (supra) ----

Busche v. Burkee 649 F20 509, 520, 7th Cir (1981(decided: the allowance of such damages involves the evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and advisability of deterrent. Therefore the infliction of damages, and the amount thereof when inflicted are of necessity written discretion of the court.

The matter of whether or not certain specified facts constitute or do not constitute probable cause, in an action for malicious prosecution, is generally for court to determine.

Nesmith v. Alford 318 F20 110 (5th Cir 1963).

If however, such specified facts reasonably can be regarded either as constituting or not constituting probable cause, the question of whether such facts constitute probable cause is for jury. Key v. Dozier 252 ALA 631, 4250 20 254.

Busche v. Burkee --- amount of damages necessary to compensate and individual for deprivation of constitutional rights is a question of fact and therefore is not to be upset on appeal unless courts determination is clearly erroneous, factual determination

can be found to be clearly erroneous only if court, after reviewing entire record, is left with the definite and firm conviction that mistake has been committed 42 USCA 1983, Fed. rules; Riv. Pro. 52 and 28 USCA. --- also --- to be compensated for damages for mental and emotional anguish in a Civil Rights suit brought under section 1983, Plaintiff need only demonstrate by competent evidence that mental and emotional distress was caused by denial of procedural due process, and plaintiff need not allege and prove elements of state tort, of intentional infliction of emotional distress.

States liberal right to prove damages in 1983 actions.

Issue No. 4

As to issue of inadequate damages, I

believe the court can safely rule that I have not been adequately compensated by this verdict, and a new trial is warranted.

Therefore, since jury awarded no damages because they could not hear evidence to base decision on, is inadequate damages grounds to grant new trial.

Answer: Yes.

A.T.F. Trucking v. Fisher Pro Sales, Inc. 498 So20 846.

New trial may be granted on ground of inadequate damages.

Issue No. 5

Was trial courts granting directed verdict in part for defendants grounds for reversal and grant for new trial.

Answer: Yes.

Plaisance v. Yelder (supra) A

directed verdict is proper only where there is a complete absence of proof on an issue material to the cause of action, or where there is no controverted issues of material fact on which reasonable persons could differ. Also: In considering propriety of directed verdict function of Court of Civil Appeals is to view evidence most favorable to non-moving party; if, by any interpretation, it can support conclusion in favor of non-moving party, directed verdict must be reversed.

Landrigan v. City of Newark (supra) --- allegations that plaintiff was arrested in bad faith and without probable cause stated Prima Facie case of false arrest cognizable under 1871 Civil Rights statute 42 USCA 1983.

General motion for directed verdict

can only go to case in its entirety and not to individual subdivisions. Motion must be made for verdict directing instruction on each of individual issues. A.R.C.P. Rule 50 of the issues raised in this brief, that it would be proper to overturn the juries verdict in this case to grant a new trial, reinstating all previous defendants, either in default to prove damages or to try this case on its merits, and settle the Constitutional issues raised by this suit.

If court decides to try it on its merits, I ask the court to allow discovery to be (re)opened, with orders to produce those records the defendants refused to produce, thereby being judged in default.

In interests of justice and the public good, I ask you grant my request

for a new trial.

Issue No. 6

Jury instructions --- although I cannot say much about jury instructions since I was not prepared to give any because it was a default case only to hear damages, there are several points I wish to make.

Although record shows I did not object to instructions, being in default, should court have even considered a verdict favoring defendants?

Since court limited talk to damages, allowed no testimony as to why I fought for my rights, why I hired lawyers, and the <u>years</u> I spent fighting this, would instructions have really mattered?

Seems like all I could say was "at least give me my $71.50 back."

And Rule 51 A.R.C.P. Committee

Comments, states, "to facilitate the making of objections, to requested written charges, this rule requires that they be served on all opposing parties. Defendant City did not do that. May be moot point, but wanted to raise the question.

CONCLUSION

I believe that for any, or all of the issues raised, that it would be proper to overturn the juries verdict in this case to grant a new trial, reinstating all previous defendants, either in default to prove damages or to try case on its merits and settle the constitutional issues raised by this suit.

If court decides to try it on merits, I ask the court to allow discovery be (re)opened, with orders to produce the records defendants refused to produce, thereby being judged in default.

In the interests of justice, and the public good I ask you grant my request for a new trial.

A- 63

Circuit Court No. CU896670
Sup CA No. 1910921

Appeal
To
Supreme Court
of Alabama
from
Circuit Court, Civil Rights
Jefferson County
Birmingham, Alabama

Oral Arguments requested

Mr. Patrick D. Kelly Appellant
vs.
Officer Arthur W. Ellis. et al Appellees

Appellant Reply Brief
*table of Authorities listed showing constitutional issues raised and supporting authorities.

TABLE OF AUTHORITIES
APPELLANT REPLY

Anela v. Wildwood (1984 DC NJ) 595 F. Supp. 511 Page 18

Borunda v. Richmond (Supra) Page 16

City of Birmingham Municipal Code 8-4-8 Page 8

Laudrigan v. City of Newark(Supra) Page 9

Plaisance v. Yelder(Supra) Page 9

Rep. transcripts pages and lines ----

(Supra - already listed in Table of Authorities)

Section 8-4-8 Municipal judge to determine law and facts; statement of offense; technical objection.

In trials before the municipal judge for violations of this code and other city ordinances, the municipal judge shall determine both the law and the fact and justice shall be speedily administered by him. No statement of the offense need be made other than that contained in the affidavit or warrant of arrest, and if the defendant has been arrested without a warrant, the entry on the docket of the offense charged shall be treated as the statement, unless the defendant shall demand a written complaint. It shall be sufficient statement of the offense in the affidavit, warrant or entry on the docket to designate the offense or act done by name or by some phrase which in common parlance designates it. It shall be no objection to the proceedings that they are imperfect or inaccurate, and all amendable errors shall be regarded as amended, so as to present only the substantial inquiry of the guilt or innocence of the defendant, and the affidavit, warrant or statement on the docket, one (1) or all, may be changed or amended to meet the state of facts shown in evidence.